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REPORT OF THE WORKING GROUP ON REPRESENTATION WITHIN LAW SCHOOL SETTINGS

INTRODUCTION

THE Group¹ addressed the role of law schools in providing representation to low-income persons. In the Group's view, law schools must act in two broad ways to improve the provision of legal services to low-income persons. As legal institutions, they must play a direct and active role in providing legal services to low-income people and, as educational institutions, they must educate, train, and socialize law students to address these issues throughout their careers. We viewed these responsibilities as complementary and identified a wide range of strategies for meeting them. In our discussions, we tried to account for the wide differences in resources and viewpoints among law schools, law students, and law faculty, but, as a group we shared the view that all lawyers, regardless of their practice settings or political beliefs, have, and should have, an obligation to address the unmet legal needs of low-income people. We came to view our recommendations as aspirational—we asked ourselves what law schools should do to fully meet their obligations in this area. We recognized that few schools combine the resources and the commitment to do all the things we outline, but we saw value in identifying what we believe are the “best practices” in each of these areas. We discussed many individual examples of tremendous commitment and creativity and hope that our recommendations and report will be useful to those trying to solve particular pieces of this complex puzzle.

I. IDENTIFYING ISSUES

We began our discussion by identifying five general areas of concern which framed our two days of discussion. The five areas, and some of the issues we identified in each area were:

A. What role should law school clinics play in providing legal services? Early in our preliminary identification of issues, the classic tension between viewing law school clinics as potential high-volume service providers or low-volume “model-practice” providers surfaced. The tension may be more illusory than real, but we agreed that many clinicians feel pulled between their desire to harness student energy and talent to serve the largest number of clients and their interest in using a small docket to develop and teach best or model-lawyering

1. Group Leader and Author: Ian S. Weinstein. Participants: Margaret Martin Barry, Susan J. Bryant, Bernadine Dohrn, Lisa G. Lerman, David J. Luban, James E. Moliterno, Deborah L. Rhode, Marcella B. Sliverman, Jerry Wein, Stephen Wizner, and Neta Ziv.

practices. We decided to discuss that tension first, along with questions of who should participate in defining a particular law school clinic's role. We believed those issues both fundamental enough and sufficiently familiar to make them a reasonable starting point.

B. What *do* we model about professional responsibility and professional role in law school clinics and what *should* we model? Several members of the Group noted that our pedagogically driven use of cases in clinic seminars can put us in some tension with our obligations of client confidentiality and can encourage us to take contradictory positions on conflicts of interest, sometimes defining our "law firm" broadly and sometimes narrowly to accommodate our teaching and supervision needs. We also noted that there are varying theories of supervisory responsibility for student practice and varying theories under which students engage in lawyerly, lawyer-like, or non-lawyer activities in clinic settings. Some clinical supervisors see themselves, or are regarded under their state rules, as the client's representative. Others define their role, and are permitted to define their role, as primarily their students' supervisor, with no direct responsibility for the clients' cases. There are very significant differences between these conceptions. In addition, some clinicians view all law student work as falling under and authorized by local student practice rules, while others distinguish among student work that could be performed by a nonlawyer (representation in many administrative settings), student work that is clearly not the practice of law (community education), and student work that constitutes the practice of law and must be authorized by local rules (representation of clients in courts of general jurisdiction). These differing notions can also have significant impact on the student-supervisor relationship and on how clinical programs are structured.

C. What is the law school's obligation to encourage pro bono representation by students and faculty? Although we quickly agreed that law schools had an obligation to encourage pro bono representation by all members of the legal community, we asked whether students and/or faculty should be required to provide pro bono representation—should non-legal work meet the obligation and should student work for academic credit count toward fulfilling the obligation?

D. What kinds of institutional support should law schools provide to encourage pro bono representation? Under this heading we asked what law schools should do to maximize pro bono activities generally. We wanted to identify strategies that would encourage student, faculty, alumni, and other practitioners in the law school's community to engage in pro bono activities.

E. What can be done to address the problem of political intervention and the stifling of academic freedom that results when courts or other bodies attempt to limit the activities of law school clinics?

We agreed that we needed to address the ongoing problem of politically-motivated intervention in law school efforts to represent low-income persons.

II. ADDRESSING THE ISSUES

A. *What Role Should Law School Clinics Play in Providing Legal Services?*

Clinicians have long discussed whether they should serve many clients in high-volume practices or serve only a few clients in order to model best practices. We discussed recasting that debate to ask how we could best teach and model “best practices for meeting unmet legal needs.” We need to think about how we teach students what it means to be excellent lawyers, and what it means to be excellent lawyers in a variety of environments, including legal services offices, as well as a variety of private-practice settings, all of which should include pro bono work.

This is, in part, a question of what skills we teach. In the litigation context, clinicians should include issues of caseload and office management. We may not choose to model carrying a caseload of one-hundred active cases, but we should address how lawyers cope with those caseloads. We must also think beyond litigation and individual client representation. Legislative reform, community education, pro se clinics, and other approaches to addressing legal problems should also be part of the clinical agenda. Several members of the Group stressed the importance of including alternative methods of delivering services in the mix of client services that clinics offer. Traditional individual client litigation-oriented clinics are particularly well suited to providing pro se clinics or community education to their mix of services. The addition of those services serves two goals: more people receive legal assistance, and law school clinics have opportunities to develop and model alternative mechanisms for delivering legal services.

In the end, we were unanimous about the importance of “model lawyering” in clinics—if model lawyering is defined as demonstrating and teaching excellence in lawyering, including devotion to justice and sensitivity to ethical and social issues. We also rejected the idea that the only model of excellence in lawyering is the devotion of unlimited resources to individual cases, although we also reject the idea that only those who can afford expensive lawyers should have access to that style of lawyering when their situation requires it. Members of the Group spoke for the notion that clinicians should develop and teach models of best practices appropriate to a variety of lawyering settings and client needs. In a world of limited resources we, and our students, need the widest array of lawyering alternatives and ways to appropriately match different methods of providing services to clients,

other individuals, and legal problems. Law schools offer one opportunity to do good lawyering—we urge clinicians to continue to expand their idea, and their students' ideas, of what constitutes good lawyering.

We then discussed the importance of involving the community in the process of identifying how any particular program should expand its notion of lawyering. The community might include our prospective clients, other individuals to whom we might provide legal services, prospective partners from the public-interest and private bars, or providers of other social services. Our discussion emphasized that law school clinics need to reach out beyond the law school to determine how they can most effectively serve low-income people. Several members talked about the difficulty in meeting the needs of both our larger and law school communities.

Typically, students are only in the clinic for about nine months and many faculty must use their summers to meet other obligations, but our larger community has legal needs all year long. Clinicians may partner with other providers, choose individual representation in types of cases that serve real community needs but are more readily scheduled around the academic calendar, or take on legal tasks, such as pre-litigation investigation and planning or legal research, that are more readily scheduled long in advance. The Group discussed these alternatives as part of a general theme of reaching beyond the law school to understand community needs and finding ways to meet those needs that are consistent with our obligations to our students and schools.

Finally, we discussed the importance of teaching about and modeling the notion that providing representation to those who cannot afford a lawyer is an indivisible part of the lawyer's role. Many of our students do not appreciate the scope of the problem of unmet legal needs. Many of them are in culture shock when they go to juvenile or domestic-relations court and professors should relate those individual experiences to the larger issues. Students have the opportunity to learn many big lessons about society in clinics, even if they only deal with one case.

B. What Do We Model About Professional Responsibility and Professional Role in Law Clinics and What Should We Model?

The Group identified and discussed two kinds of ethical problems presented by clinical supervision. The first was what the supervisor should do when the governing law of professional responsibility may conflict with his or her own view of justice. The second problem was when, and on what theory, the supervisor should intervene to prevent a student from violating professional norms or rules.

As we began to discuss these problems, one group member asked if anyone in the Group was aware of any law school clinician who had

either reported an ethical violation or been the subject of a disciplinary hearing. The Group could only muster one confirmed disciplinary action and no examples of reporting. We agreed, however, that despite under-enforcement of the rules and the general tendency of lawyers to protect each other (or perhaps because of those factors), we had a strong obligation, as teachers, to focus our students' attention on these issues and discuss them with our students and colleagues.

We can only report that these two problems provoked an interesting discussion but did not lead us to any major conclusions in the area. There were a variety of views on how hard a supervisor should push a student to reconcile professional obligations and personal moral views, but, at the end of the day, the Group agreed that we were all very unlikely to tell a student to simply violate a clear rule, though we acknowledged that few situations came down to such clear choices.

Although we identified client-confidentiality and conflict-of-interest rules as problematic for many clinics, we did not discuss the issues directly and recommended further study in those areas.

C. What Is the Law School's Obligation to Encourage Pro Bono Representation by Students and Faculty?

Our discussion of this question began with the issue of mandatory versus non-mandatory pro bono. Our consensus was that the better approach is non-mandatory pro bono. We came to this position after agreeing that neither the practicing bar nor most law school faculties would ever impose mandatory pro bono obligations on themselves. Rather than face the hypocrisy of requiring only law students to serve others, we believe the better approach is to put everyone, lawyers, law students, and law professors, under the same moral obligation and do all we can to make that obligation real. We then discussed what kind of pro bono activities would fulfill that moral obligation.

The Group urged that all law students and faculty should provide legal services for those who cannot afford them. Our definition is narrow in two regards. First, we believe lawyers should do legal work. Other kinds of community service are valuable, but lawyers have a special expertise and special legal privileges and should give of their legal talents, in addition to whatever other service they offer their communities. We also believe that their legal work should be on behalf of those who cannot afford legal services, rather than on behalf of any not-for-profit organization or some other category of worthy recipients. The societal crisis we face is among those who cannot afford services and that is the need that should be addressed. Although our definition of pro bono work is narrow, we urge that students and faculty be permitted to fulfill their obligations in as many different law-school settings as possible. Students should be permitted to fulfill their pro bono obligation in credit and non-credit settings and faculty

should be encouraged to engage in any lawyering activities they choose, including legislative testimony, brief or memoranda writing, legal research in support on some ongoing legal matter and community education, as well as direct client representation.

D. *What Kinds of Institutional Support Should Law Schools Provide to Encourage Pro Bono Representation?*

In this part of our discussion we asked what law schools could do to promote pro bono representation both in and outside of the law school. Within the law school, we believe a significant commitment of resources is essential. Students are best encouraged by a structure that both facilitates their pro bono work and conveys a strong, concrete message about the institution's commitment to those activities. Every school should have at least one full-time pro bono supervisor or coordinator and a pro bono or public-interest resource center. The center would match students with legal services organizations and provide support for student-initiated projects.

Discussion of these activities led to concerns about the unauthorized practice of law and the inadequate supervision of law students engaged in student-initiated pro bono projects. We discussed the importance of matching case types and supervision—some kinds of pro bono legal work carry little risk of harming the client and require little supervision, while other sorts will require extensive work from volunteer attorney supervisors. We also discussed the development of a student-client privilege for cases in administrative settings which permit non-lawyer representation.

In addition to committing resources, we believe that alumni involvement in a school's pro bono activities is of tremendous importance. Alumni exercise tremendous authority at most law schools. They are also the most direct way schools can influence the practice community. Alumni can provide financial support for a public-interest center, they can refer cases, supervise students, and model attorney commitment to pro bono activities.

Law schools should also take steps to encourage current students to engage in pro bono work after graduation. For example, schools may encourage current students to adopt a community or practice area and continue that work upon graduation. Support for continued work might include CLE training and administrative support. Schools may also encourage graduates entering big law firms to seek their firms' permission to bring in pro bono projects developed at the law school and partially supported by the school through continued faculty involvement or other kinds of support.

The conversation next turned to financing a legal education and the impact of loan debt on career choices and pro bono activities. Loan-forgiveness programs were critiqued for not increasing the supply of public interest and public service jobs, just redistributing them.

Others noted that conditions varied dramatically from school to school. Graduates may have very different kinds of options available and schools have differing abilities to provide aid. These observations made some of us believe that general prescriptions for how individual schools should address the problem of loan debt are problematic. The Group did agree that schools should use a combination of summer stipends, scholarship aid tied to a commitment to do public interest work for a set term, loan forgiveness and school funded postgraduate fellowships to encourage public interest and public service work.

We closed this part of our discussion with the acknowledgment that although encouraging careers in public interest and public service work is important, we should not lose sight of the goal of encouraging every lawyer, in every setting, to address the legal needs of low-income people. Every law student should view that obligation as part of his or her professional identity. We discussed the importance of reflecting that value in the curriculum in a variety of ways, including in professional-responsibility courses, by maintaining a wide availability of clinics and externships, and by integrating the law school into the community in as many ways as possible.

E. What Can Be Done to Address the Problem of Political Intervention and the Stifling of Academic Freedom that Results When Courts or Other Bodies Attempt to Limit the Activities of Law-School Clinics?

The final topic we discussed was the problem of political intervention by courts, legislators, or executive officers, inspired by the clinical representation of unpopular or powerless clients. One member of the Group had experienced interference from powerful alumni, who campaigned to withdraw contributions if clinicians kept representing an unpopular client. Our discussion was inspired by the recent actions of the Louisiana Supreme Court in response to work done by the Tulane Environmental Law Clinic.

The Group agreed that law school faculty should make decisions about the kinds of clients, cases and other matters that law school clinics take on. Those decisions should be based on our teaching mission and should not be constrained by political actors or others outside of the law school faculty. Violation of that principle threatens academic freedom and professional independence.

Notes & Observations